No. 2521

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR LAKE (a corporation),

Appellant,

vs.

JOSEPH CRAIG, WILLIAM A. BRADY, E. L. PHILLIPS, ARCHIBALD S. WHITE, C. L. PARMALEE, GEORGE H. HULL, JR., ROY M. PIKE, OAKLAND BANK OF SAVINGS (a corporation), YOLO COUNTY CONSOLIDATED WATER COMPANY (a corporation), CAPAY DITCH COMPANY (a corporation), YOLO WATER AND POWER COMPANY (a corporation), and WHITE & COMPANY (a common name under which more than two persons are associated in business and transact such business),

Appellees.

BRIEF FOR APPELLEES.

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F. D. Monckton,
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S. C. DENSON,
JOHN S. PARTRIDGE,
ALAN C. VAN FLEET,
Attorneys for Appellees.

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FRANK D. MONCKTON, Clerk.

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BRIEF FOR APPELLEES.

Statement of Facts.

In 1906, three corporations, hereinafter referred to as the Allied Corporations, were organized as California corporations. The Central Counties

Land Company, hereinafter referred to as the Land Company, was to acquire all the land bordering on Clear Lake. The California Industrial Company, hereinafter referred to as the Industrial Company, was to own all the riparian rights in said lake, to build a dam, and impound its waters. The Central California Power Company, hereinafter referred to as the Power Company, was to develop hydro-electric power. After leaving the power plant, the water was then to be devoted to irrigation.

The defendant, Yolo County Consolidated Water Company, a California corporation, hereinafter referred to as the Yolo Co. Water Company, was then in existence and owned canals and irrigation ditches in Yolo County, and rights in the natural flow of Cache Creek.

One Vandercook, acting in co-operation with the Allied Corporations (Tr. p. 19), entered into a *contract* in 1907 with the holders of three-fourths of the subscribed capital stock of the Yolo Co. Water Company, to purchase their stock (see Contract of January 19, 1907, Tr. pp. 9-18).

In 1908, a merger of the interests of the Allied Corporations and Vandercook was planned, to be controlled by the Clear Lake Power and Irrigation Company, still another California corporation, hereinafter referred to as the Merger Corporation. A merger agreement was entered into between the stockholders of the Allied Corporations and Vander-

cook, whereby the former agreed to transfer their assets, and the latter agreed to assign his rights under the aforesaid contract of January 19, 1907, to the Merger Corporation (Agreement, Mch. 3, 1908, between shareholders of Allied Corporations and Vandercook, Tr. pp. 25-28).

The Merger Corporation then passed a resolution to issue stock in exchange for the transfer of the stock of the Allied Corporations and Vandercook's contract with the stockholders of the Yolo Co. Water Company.

The Merger Corporation, seeing the necessity for increased capital, took steps to procure funds in the east from defendant White & Company.

The bill then alleges that defendant Craig, a stockholder of the Yolo Co. Water Company, and a director of the Land Company, planned to cancel the Vandercook agreement, and turn over the stock in the Yolo Co. Water Company and the holdings of the Land Company to White & Co. at a profit to himself (Tr. pp. 37-40).

It is then alleged that Craig organized the defendant, Yolo Water & Power Company, as an agency to carry out the conspiracy, procured the stockholders of the Yolo Co. Water Company to agree to sell their stock to him and transferred his rights to the said Yolo Water & Power Company (Tr. p. 42).

Then the stockholders of the Yolo Co. Water Company called upon Vandercook to fulfill his con-

tract of purchase and Vandercook, basing his action on the ground that he had procured an extension of time on his obligation to purchase and that such additional time for performance had not expired, treated this demand as a breach of the contract (Tr. p. 58).

It is then alleged that Craig, having secured said contract for the sale of the stock of the Yolo Co. Water Company, procured conveyances of land on Clear Lake from mortgagees of the Land Company and further caused bonds to be issued by the Yolo Water & Power Company, secured by a deed of trust of said lands (Tr. p. 43).

This was the situation in 1913. Then, to quote the bill:

> "On the *9th day of April, 1913, the plaintiff corporation was organized, as aforesaid, under the laws of the State of Arizona;* that the organization of said corporation was brought about at the instance of divers creditors of the said Central Counties Land Company; that the creditors of said last-named corporation were each and all persons who had been defrauded in and by the aforesaid scheme and conspiracy. That thereafter the claims and demands of all the creditors, so far as known to plaintiff, against said Central Counties Land Company, amounting to $700,000.00 or thereabouts, were duly *assigned, transferred and set over unto this plaintiff or agreed to be so assigned, transferred and set over,* and the claims of all the creditors of said California Industrial Company, and of the said Central California Power Company were likewise transferred, assigned, and set over to this plaintiff, and thereupon

there was issued to various creditors of the said corporations, in consideration thereof and exchange therefor, a total of thirty-five hundred (3500) shares of the capital stock of this plaintiff, of the par value of one hundred ($100.00) dollars each.

That thereafter the *trustees of the said Central Counties Land Company,* in partial satisfaction of the said creditors' claims, *sold, assigned, transferred and set over unto this plaintiff all of the assets and property, choses in action, rights and equities of every kind and character arising out of the transactions herein referred to, and belonging to the said Central Counties Land Company, or vested in them as trustees.* * * * And thereafter the *trustees of the said California Industrial Company and the trustees of the said Central California Power Company* (the rights of each of said last named corporations to do business having theretofore been forfeited for non-payment of the state license tax), in consideration of the cancellation of all of the indebtedness of the said respective corporations, *have sold, assigned, transferred, conveyed, set over and delivered to plaintiff all of the assets, properties, claims, and equities of every kind and character belonging to the said two last-named defunct corporations, or belonging to or vested in them as trustees thereof.* That the assets so received by plaintiff were of less value than the outstanding creditors' claims against said corporations, and that plaintiff's stockholders include substantially all of the creditors of said defunct corporation, who, as aforesaid, were defrauded by the said scheme and conspiracy.

That plaintiff is now the owner and holder of all of the aforesaid *properties, rights, choses in action, equities and assets* formerly owned by said defunct corporations and their trustees.

> That plaintiff is now the owner and holder of all of the *choses in action, rights and equities,* of the aforesaid California Counties Land Company, California Industrial Company, and Central California Power Company, and of substantially all, if not all, of the creditors' claims against said defunct corporations, and of the claims of the trustees of said defunct corporations, *including all choses in action, rights and equities accrued or accruing to them,* or to any or either of them, by reason of the aforesaid fraudulent acts and conduct of the said parties to the said fraudulent scheme and conspiracy, and of the defendant Yolo Water and Power Company, the agent and instrumentality of the said conspirators as aforesaid'' (Tr. pp. 73-75).

In short, the Allied Corporations, *California corporations,* assigned to the appellant, *an Arizona corporation* organized April 9, 1913, all their rights under Vandercook's contract with the stockholders of the Yolo Co. Water Company, *which constituted the principal asset of the Allied Corporations,* and all other "properties, rights, choses in action, equities and assets" (quoting from the bill, Tr. p. 75), as the Allied Corporations stood possessed of. Under the comprehensive clause above quoted must no doubt be included the rights which the Land Company had to redeem its land bordering on Clear Lake from the defendant Yolo Water and Power Company, which held under conveyance from the mortgagees of said Land Company.

Looking behind the legal verbiage which is employed in appellants multifarious prayer for relief,

it is clear that what appellant seeks is to enforce performance of the Vandercook agreement and to redeem the lands of the Land Company from its mortgages. In short, the appellant is the assignee of choses in action previously vested in the Allied Corporations, its assignors, and is seeking to recover upon said choses in action.

Argument on the Law.

Appellant opens his brief with the following query on page 12:

> "The sole question here is simply this: Is appellant to be deemed merely the assignee of choses in action? And is this bill so framed that for jurisdictional purposes the suit must be deemed a mere suit to recover on a chose in action?"

We may concede that the bill in equity in the case at bar is not "so framed" as to bring it within the application of Section 24 of the Judicial Code. But this Court in passing on the jurisdictional question here involved, will not stop at an examination of the framework of the bill, but will look through its form to its substance and apply Section 24 to its character as there revealed.

I.

THE BILL IN EQUITY SEEKS SPECIFIC PERFORMANCE OF THE RIGHTS ACQUIRED BY THE ALLIED CORPORATIONS UNDER VANDERCOOK'S CONTRACT WITH THE STOCKHOLDERS OF THE YOLO COUNTY CONSOLIDATED WATER COMPANY. APPELLANT MAINTAINS THE BILL AS AN ASSIGNEE SEEKING TO RECOVER UPON A CHOSE IN ACTION UNDER SECTION 24 OF THE JUDICIAL CODE.

An examination of the facts of this case will show that the principal relief sought is the enforcement of the rights under Vandercook's contract. The Allied Corporations, having perfected their plans to impound the waters of Clear Lake and develop hydro-electric power, wanted to acquire a distributing system for the disposition of the water so impounded for irrigation purposes. The Yolo County Consolidated Water Company owned such a system. Vandercook, acting in co-operation with the Allied Corporations, obtained a contract from the stockholders of three-fourth of the capital stock of the Yolo County Consolidated Water Company for the purchase of their holdings. This contract, by virtue of the "merger agreement" became the property of the Allied Corporations and then, by assignment, the property of appellant herein.

It follows that when appellant in its prayer for relief asks:

> "That the contracts to irrigate the said 50,000 acres or thereabouts which the defendant Yolo Water and Power Company has acquired as aforesaid in fraud of the rights of plaintiff be adjudged and decreed to be held by said defend-

> ant Yolo Water and Power Company in trust for plaintiff, and that said defendant be compelled to transfer, assign, set over and convey *said contracts, or any rights acquired thereunder,* to this plaintiff upon plaintiff's doing equity with respect thereto in the manner and to the extent that this Honorable Court shall adjudge to be fair, proper, and equitable" (Tr. pp. 91-92),

appellant is suing as assignee to recover upon a chose in action arising out of contract. Appellant is suing to *compel specific performance of a contract to convey stock.*

It is well settled that if the stock in question is the subject of every day sale in the market, specific performance will be denied. When, however, stock has no market value and cannot be readily obtained except from a party to the contract, by the prevailing rule in this country specific performance may be had. This is the rule in California.

> *Fleishman v. Woods,* 135 Cal. 256;
> *Krouse v. Woodward,* 110 Cal. 638;
> *Gilfillan v. Gilfillan,* 47 Cal. Decs. 707.

Accordingly, the case at bar is governed by the cases decided by the Supreme Court of the United States, which hold that a suit for the specific performance of a contract, or to enforce it, or to realize the fruits of the rights acquired by it, is one to "recover the contents of a chose in action" under the acts prior to 1912 and is one to "recover

upon a chose in action" under the Judicial Code of 1912.

Corbin v. Black Hawk Co., 105 U. S. 659; 26 L. ed. 1136;

Shoecraft v. Bloxham, 124 U. S. 730; 31 L. ed. 574;

The Plant Investment Co. v. Jacksonville etc. Ry. Co., 152 U. S. 71; 38 L. ed. 358.

It makes no difference that appellant characterizes its bill as one "to obtain various forms of equitable relief" and the particular count in the bill here under consideration as one "to establish a *constructive trust* in a large amount of real and personal property, including contracts for water rights; and to compel the conveyance thereof to appellant" (Appellant's Brief p. 2). The fact that appellant seeks the interposition of a court of equity does not alter the nature of its cause of action. But for Vandercook's contract with the stockholders of the Yolo County Consolidated Water Company, appellant could not now assert a constructive trust in the subject matter of such contract. In the last analysis, whatever may be the *form* of appellant's remedy, appellant seeks but to enforce its rights under a *contract.* It matters not whether the appellant's rights be *legal or equitable* in character, in either event appellant, as assignee, cannot pursue his remedy in the Federal Courts because of the express inhibition of Section 24 of the Judicial Code.

In *Shoecraft v. Bloxham,* 124 U. S. 730, 31 L. ed. 574, it is said:

> "It is true the complainant is a mortgagee in trust of such interest as the mortgagor had in the lands, but he brings the suit, not to foreclose the mortgage, but as one having a *beneficial interest in the contract* and consequently a right to enforce it. The object of the suit is to perfect the title to the lands mortgaged by enforcing the performance of the contract. The deed of trust sets out in full the contract, and conveys all the right, title and interest which the railroad company had or might thereafter acquire in and to the lands granted by the trustees by their contract of May 31, 1871. This conveyance of all right, title and interest 'in and to' the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant *an interest in the contract so far as such lands were concerned, that is the right to perfect the title to such lands by enforcement of the contract. It was in legal effect the assignment of the contract itself."*

To the same effect we refer the Court to the following language of the Court in *Wilkinson v. Wilkinson,* 29 Fed. Cas. No. 17,677:

> "Whether the right be legal or equitable, whether the assignment thereof passed a legal title so as to enable the assignee to sue in his own name at law, or only an equitable title, to be asserted through the aid of a court of chancery, it was equally the purpose of this restrictive clause to prevent the citizenship of the assignee from enabling him to come into a court of the United States. Such, in general, was the view taken of it by the supreme court in Sheldon v. Sill, 8 How. (49 U. S.) 441; and which was not modified by Deshler v. Dodge,

16 How. (57 U. S.) 622, which explained its meaning."

Appellant refers this Court to the case of *Commonwealth S. S. Co. v. Am. Shipbuilding Co.,* 197 Fed. 780, in support of its statement that a suit like the case at bar is not within Section 24 of the Judicial Code. In that case the Hawgoods *promoted* the plaintiff company. While acting as promoters, they made certain contracts, to enure to the benefit of the plaintiff company when incorporated, with the defendant company. On these contracts they received a secret commission with the connivance of the defendant company, which had full knowledge of the relations between the Hawgoods and the plaintiff company. Soon after the formation of the plaintiff company and its adoption of the contracts, plaintiff discovered the fraud and brought an action for rescission of the contract.

It was objected by defendant that plaintiff was an assignee of the Hawgoods and that it did not appear from the bill that the assignor could have maintained the action.

The Court says:

"The complainant alleges facts in its bills of complaint showing that the Hawgoods while acting in a trust capacity received a bribe or commission.

"I think it is well established that, when an *agent* has been bribed to betray his *principal,* that fact is sufficient to entitle the principal to repudiate the transaction.

"Now does this bill endeavor to set forth a cause of action which seeks to enforce a right

conferred upon the Hawgoods by a contract assigned by them to the complainant? From the allegations of the bills, whatever contracts the Hawgoods had with the defendant for the construction of steamers *certainly gave the Hawgoods no right to rescind the contracts. The complainant's right to rescind the contract is not based on any contract rights transferred to it by the Hawgoods,* but the bills in their entirety proceed upon the theory that the rights of action exist in the complainant by reason of the fraud of the Hawgoods and the defendant.

"I cannot see that section 657, Rev. Stats. U. S. (U. S. Comp. St. 1901, p. 529) has any application to the bills in question.

"The complainant makes no claim that it is the assignee of the Hawgoods. They allege that the Hawgoods were the trustees and merely held the legal title, and *they rely on no cause of action which the Hawgoods had or might claim they had at any time. The complainant is not relying on the right of the Hawgoods,* but upon the fraud of the Hawgoods and the defendant."

No case could better express appellee's position in the case at bar. Of course the Hawgoods had no right of action against the defendant for rescission of the contract, for both the Hawgoods and the defendant were *parties to the fraud.* But in the case at bar the Allied Corporations and the defendants Craig and the Yolo Power and Water Company (to adopt a metaphor) were not parties to the fraud. The fraud was that of Craig and the Yolo Power and Water Company alone. The Allied Corporations had a right of action against said defendants for the fraud and this right of

action came to appellant by assignment. *Appellant relies on a cause of action which the Allied Corporations had.*

II.

THE BILL IN EQUITY FURTHER SEEKS TO REDEEM CERTAIN LAND OWNED BY THE CENTRAL COUNTIES LAND COMPANY FROM MORTGAGE AND TO CANCEL A DEED OF TRUST TO SAID LAND AS A CLOUD ON TITLE.

The bill avers that the Central Counties Land Company, one of the Allied Corporations, owned land under mortgage to divers persons; that the mortgages were in the form of deeds absolute; that the defendant conspirators procured the mortgagees to execute conveyances of said lands to the defendant Yolo Water and Power Company and that the said Yolo Water and Power Company caused bonds to be issued, and executed a deed of trust of said lands to secure the same. Accordingly the prayer asks:

> 1. "That defendants be compelled to set forth the rights which they now claim to have in and to the lands, and in and to the overflowage rights in lands, bordering upon Clear Lake and Cache Creek; that inquiry be made into the said claim, and, if found valid, then that further inquiry be made as to whether or not the same are held in trust for this plaintiff, and, if so, *that conveyance thereof be decreed and directed,* upon such terms as may be just and equitable, and if such rights are found to exist in defendants, or any or either of them in absolute ownership, then that the same be condemned herein to the use and benefit of this

plaintiff to the full extent that may be necessary for the aforesaid enterprise" (Tr. pp. 92-93).

2. "That the lien of the said deed of trust, if adjudged to be a valid lien at all, be confined in and by the decree of this Honorable Court to the properties situate in Yolo County, California, and owned by the defendants Yolo County Consolidated Water Company and Yolo Water and Power Company.

"That the said deed of trust so recorded, as aforesaid, in Lake County, California, and the record thereof, be adjudged to be a cloud upon plaintiff's title to the aforesaid Spring Valley ranch and the aforesaid Collier ranch, and removed and canceled as such cloud" (Tr. pp. 88-89).

It will be apparent that appellant, claiming through assignment from the Central Counties Land Company, is seeking to redeem lands owned by said company from a mortgage and to remove any cloud existing on said land. Appellees have discussed the rights of an assignee of a mortgagor seeking to redeem very fully in their briefs in *"Power and Irrigation Company of Clear Lake v. Capay Ditch Company et al.,"* No. 2500, and *"Power and Irrigation Company of Clear Lake v. Stephens et al.,"* No. 2501. The nature of the right of action of an assignee seeking to quiet title is considered in their brief in the former case. We respectfully refer to said briefs and beg leave to make the discussion of the jurisdictional questions therein contained a part hereof.

From the authorities cited in said discussions, as well as from what is set forth hereinabove, it must be clear that the action of the lower Court in dismissing this bill for want of jurisdiction was founded on a correct application of Section 24 of the Judicial Code. We respectfully submit that the decree dismissing this bill for want of jurisdiction was proper and should be affirmed.

Dated, San Francisco,
March 10, 1915.

S. C. Denson,
John S. Partridge,
Alan C. Van Fleet,
Attorneys for Appellees.